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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
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9 CHARLES S. LONGSHORE,

10 Plaintiff,

11 v.

12 ROBERT HERZOG, et al.,

13 Defendants.
14

No. 4:17-CV-05003-SAB

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

15 Before the Court is Defendants' Motion for Summary Judgment, ECF No.
16 111. The motion was heard without oral argument. Defendants request that
17 summary judgment be entered in their favor and that Plaintiff's claims be
18 dismissed with prejudice. Plaintiff objects and requests that the Court deny the
19 motion and allow his case to proceed to trial. ECF No. 213. Pursuant to the Order
20 issued on May 11, 2017, the Court will consider Defendants' motion only on the
21 issue of qualified immunity.¹ ECF No. 182. Having reviewed the pleadings and the
22 file in this matter, the Court is fully informed and grants Defendants' motion on
23 the issue of qualified immunity.

24 **FACTS**

25 Mr. Longshore was an inmate at the Washington State Penitentiary
26 ("WSP"). WSP has special housing units for inmates who are in protective custody
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28 ¹ In the interest of fairness and justice, the Court is not willing to allow the summary disposal of Plaintiff's claims before Plaintiff has had a full opportunity to request discovery on the issues.

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S
MOTION FOR SUMMARY ^ 1**

1 for mental health or other reasons. ECF No. 115 at 2. On January 10, 2015, Mr.
2 Longshore wrote a letter to WSP Superintendent Donald Holbrook requesting he
3 be transferred to those special housing units known as the “BAR Units.” ECF No.
4 115, Exhibit 1. Mr. Longshore promised to “not cause problems” in the BAR
5 Units, and Superintendent Holbrook responded by granting his request. *Id.*

6 On July 1, 2015, Mr. Longshore received an infraction stemming from an
7 assault on a WSP staff member. As a result of Mr. Longshore’s behavior, coupled
8 with the fragile nature of the inmate population in the BAR Units, WSP staff
9 believed transferring Mr. Longshore back to the BAR Units was not appropriate.
10 ECF No. 115, Exhibit 2. Instead, Mr. Longshore remained in the Intensive
11 Management Unit (“IMU”). The parties agree that Mr. Longshore has been in
12 WSP IMU custody from approximately July 1, 2015 to December 14, 2016, when
13 he was transferred to the IMU at Stafford Creek Corrections Center.

14 According to Defendants, Mr. Longshore’s continued placement at the IMU
15 was based on lack of viable placement alternatives,² Mr. Longshore’s behavior at
16 the IMU,³ his criminal history,⁴ his past prison behavior,⁵ and the concern for his
17 personal safety.⁶ Mr. Longshore, on the other hand, claims that his continued
18 placement at the IMU violates his federal civil rights pursuant to the Eighth and
19 Fourteenth Amendments.

20 On May 3, 2017, Defendants filed a Motion to Stay Discovery Pending
21 Resolution of Defendants’ Motion for Summary Judgment. ECF No. 171. The
22 Court granted this motion, ordering a stay pending the Court’s consideration of
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25 ² ECF No. 112 ¶ 8-12.

26 ³ ECF No. 112 ¶ 13-19.

27 ⁴ Mr. Longshore is currently serving a life sentence for two counts of aggravated first degree murder. However, his
murder convictions were recently reversed by the Washington State Court of Appeals and the case was remanded to
the Mason County Superior Court for further proceedings. *See State v. Longshore*, No 47030-6-II, 2016 WL
7403795 (Wash. Ct. App. Dec. 21, 2016).

28 ⁵ ECF No. 112 ¶ 3-7.

⁶ ECF No. 112 ¶ 8.

1 Defendants' motion for summary judgment only on the issue of qualified
2 immunity. ECF No. 182.

3 STANDARD

4 Summary judgment is appropriate if the record established "no genuine
5 dispute as to any material fact and the movant is entitled to judgment as a matter of
6 law." Fed. R. Civ. P. 56(a). The non-moving party must point to specific facts
7 establishing a genuine dispute of material fact for trial. *Celotex Corp. v. Catrett*,
8 477 U.S. 317, 324 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
9 U.S. 574, 586-87 (1986). There is no genuine issue for trial unless there is
10 sufficient evidence favoring the nonmoving party for a jury to return a verdict in
11 that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). If
12 the non-moving party fails to show a genuine dispute of material fact as to the
13 elements essential to its case for which it bears the burden of proof, such that the
14 moving party is entitled to judgment as a matter of law, the trial court must grant
15 the summary judgment motion. *Celotex Corp.*, 477 U.S. at 322.

16 DISCUSSION

17 The doctrine of qualified immunity shields government officials from civil
18 liability under Section 1983 if "their conduct does not violate clearly established
19 statutory or constitutional rights of which a reasonable person would have
20 known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Supreme Court has
21 set forth a two-part analysis for resolving qualified immunity claims. *See Pearson*
22 *v. Callahan*, 555 U.S. 223, 232 (2009). The Court must determine (1) whether
23 Plaintiff has shown a violation of a constitutional right; and (2) whether that right
24 was clearly established at the time of the incident. *Id.* "The relevant, dispositive
25 inquiry in determining whether a right is clearly established is whether it would be
26 clear to a reasonable officer that his conduct was unlawful in the situation he
27 confronted." *Phillips v. Hust*, 588 F.3d 652, 657 (9th Cir. 2009) (quoting *Saucier*
28 *v. Katz*, 533 U.S. 194, 202 (2001)). "[I]f the defendants' conduct is so patently

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S
MOTION FOR SUMMARY ^ 3**

1 violative of the constitutional right that reasonable officials would know without
2 guidance from the courts that the action was unconstitutional, closely analogous
3 pre-existing case law is not required to show that the law is clearly established.”
4 *Mendoza v. Block*, 27 F.3d 1357, 1367 (9th Cir. 1994). Although the officer’s
5 subjective intent is irrelevant, *Anderson v. Creighton*, 483 U.S. 635, 641 (1987),
6 the information actually possessed by the officer is relevant to this determination.
7 *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

8 **Eighth Amendment Claim**

9 The Constitution “‘does not mandate comfortable prisons,’ but neither does
10 it permit inhumane ones.” *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting
11 *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)). It is well settled that “the
12 treatment a prisoner receives in prison and the conditions under which he is
13 confined are subject to scrutiny under the Eighth Amendment.” *Helling v.*
14 *McKinney*, 509 U.S. 25, 31 (1993). To prove a claim under 42 U.S.C. § 1983 and
15 the Eighth Amendment, Plaintiff must establish two things. First, he must show
16 that the alleged deprivation is “sufficiently serious”; meaning that the “prison
17 official’s act or omission must result in the denial of the ‘minimal civilized
18 measure of life’s necessities.’” *Farmer*, 511 U.S. at 834 (quoting *Rhodes*, 452 U.S.
19 at 347)). And second, he must show the prison official acted with deliberate
20 indifference; meaning that the official knew of and disregarded an excessive risk
21 to inmate health or safety. *Id.* at 837.

22 In the context of a claim under the Eighth Amendment for failure to provide
23 adequate medical care, Plaintiff must show a deliberate indifference to his serious
24 medical needs. *Estelle v. Gamble*, 429 U.S. 91, 104 (1976). A serious medical
25 need exists if the failure to treat a prisoner’s condition could result in further
26 significant injury or the unnecessary and wonton infliction of pain. *McGuckin v.*
27 *Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds by *WMX*
28 *Tech., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997). In order to establish deliberate

1 indifference, there must first be a purposeful act or failure to act on the part of the
2 defendant. *Id.* at 1060.

3 Mr. Longshore has failed to show a constitutional violation because he has
4 not demonstrated any deliberate indifference attributable to Defendants. Mr.
5 Longshore's Eighth Amendment claim is two-fold: (1) he has received inadequate
6 mental health care; and (2) he is subject to conditions of confinement that deny
7 him "the minimal civilized measure of life's necessities." ECF No. 231 at 13-14.
8 With respect to the first issue, Mr. Longshore claims "it is my belief that the
9 Department has the staff and facilities to treat what the Department has diagnosed
10 as my serious mental conditions." ECF No. 203 at 5. However, Mr. Longshore
11 does not provide evidence as to how the mental health care he is currently
12 receiving is inadequate. In fact, the record demonstrates that he has received
13 significant mental health care by numerous professionals. ECF Nos. 116, 45.

14 Even if Mr. Longshore's mental health care is inadequate, his claim fails
15 because he has not provided any evidence that Defendants acted with deliberate
16 indifference to his serious medical needs. His claim with respect to the conditions
17 of his confinement fails for the same reason. Plaintiff's expert, Harvey Cox,
18 provided an affidavit wherein he claims that Defendants "demonstrated a
19 deliberate indifference to the mental health of Mr. Longshore by assigning him to
20 isolation in a non-mental health treatment unit." ECF No. 203, Exhibit E.
21 However, there are two issues with this assertion. First, it is vague and conclusory;
22 it does not provide any facts to support a finding of deliberate indifference. *See*
23 *Paterson v. Little, Brown & Co.*, 502 F. Supp. 2d 1124, 1132 (W.D. Wash. 2007)
24 ("In order to defeat a motion for summary judgment, the non-moving party must
25 make more than conclusory allegations, speculations, or argumentative assertions
26 that material facts are in dispute."). Second, assigning an inmate to segregated
27 housing does not, in itself, constitute deliberate indifference; this requires a greater
28 showing. *See Toussaint v. Yockey*, 722 F.2d 1490, 1494 n.6 (9th Cir. 1984) ("Even

1 an indeterminate sentence to punitive isolation does not without more constitute
2 cruel and unusual punishment.”).

3 In fact, the record shows concrete reasons behind Defendants’ decision to
4 keep Mr. Longshore in the IMU. In his time at the IMU, Mr. Longshore received
5 four⁷ status review hearings. ECF No. 115 at 4. The basis for Mr. Longshore’s
6 continued placement in the IMU includes his past prison behavior; limited
7 placement options within Department of Corrections facilities; and behavior
8 raising serious concerns with his mental health. ECF No. 112.

9 A critical component to Defendants’ decision to keep Mr. Longshore at the
10 IMU is the concern for his personal safety. Mr. Longshore is the target of the
11 Native American prison “Blood” gang. ECF No. 113 at 2-3. The prison gang
12 wants to kill Mr. Longshore; a threat that Mr. Longshore himself cited in support
13 of his continued placement in the IMU. ECF No. 113, Exhibit 1. In fact, releasing
14 Mr. Longshore in light of this serious threat may have resulted in a violation of his
15 Eighth Amendment right to prison safety. *See Farmer*, 511 U.S. at 837 (to
16 demonstrate that a prison official was deliberately indifferent to a serious threat to
17 the inmate’s safety, the prisoner must show that the official knew of and
18 disregarded an excessive risk to inmate safety).

19 Because Plaintiff has failed to show a violation of a constitutional right, *see*
20 *Pearson*, 555 U.S. at 232, the Court finds Defendants are entitled to qualified
21 immunity from Mr. Longshore’s Eighth Amendment claim.

22 **Fourteenth Amendment Claim**

23 To state a claim under 42 U.S.C. § 1983 and the Fourteenth Amendment,
24 Plaintiff must establish that he suffered (1) deprivation of a liberty interest, and (2)
25 due process was not provided. *See Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S.
26 532, 541 (1985). In the context of administrative segregation, a federal liberty

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28 ⁷ The outcome of the first three was to retain him in the WSP IMU; the outcome of the fourth was to transfer him to the Stafford Creek Corrections Center IMU. ECF No. 115 at 4.

1 interest exists only if the administrative segregation was an “atypical and
2 significant hardship on the inmate in relation to the ordinary incidents of prison
3 life.” *Sandin v. Connor*, 515 U.S. 472, 484 (1995).

4 To determine whether the prison official’s action constituted an “atypical
5 and significant hardship on the inmate,” courts consider the conditions of
6 segregation and its duration. *Sandin*, 515 U.S. at 494; *see also Hutto v. Finney*,
7 437 U.S. 678, 686-87 (1978). The Second Circuit has determined that when
8 placement in segregated housing is longer than 305 days, the placement
9 constitutes “a sufficient departure from the ordinary incidents of prison life,” so as
10 to trigger procedural due process protections under *Sandin*. *Palmer v. Richards*,
11 364 F.3d 60, 65 (2d Cir. 2004). The Ninth Circuit has also held that a Fourteenth
12 Amendment liberty interest may be created when inmates are deprived of periodic,
13 meaningful reviews of whether continued segregation is appropriate because such
14 a deprivation makes segregation atypical. *Brown v. Oregon Dept. of Corr.*, 751
15 F.3d 983, 988 (9th Cir. 2014).

16 The Supreme Court has indicated that, when there is a liberty interest
17 sufficient to implicate the Due Process Clause, “some sort of periodic review” of
18 confinement in segregated housing is necessary to satisfy due process. *Hewitt v.*
19 *Helms*, 459 U.S. 460, 477 n.9, rejected on other grounds by *Sandin*, 515 U.S. 472;
20 *see also Wilkinson v. Austin*, 545 U.S. 209 (2005) (upholding Ohio’s system for
21 placing inmates in high security restrictive facilities, which includes annual
22 reviews of inmate status). The Court has noted that this periodic review does not
23 necessarily require new evidence of statements, and continued placement in
24 segregated housing may be based on “facts relating to a particular prisoner” and
25 “the officials’ general knowledge of prison conditions and tensions.” *Id.* The Ninth
26 Circuit has further explained, however, that a prisoner’s due process rights will not
27 be satisfied by “meaningless gestures.” *Toussaint v. McCarthy*, 801 F.2d 1080,
28 1102 (9th Cir. 1986), abrogated on other grounds by *Sandin*, 515 U.S. 472.

1 In this case, the Court finds that Mr. Longshore's continued placement in
2 the IMU for over two years constitutes an "atypical and significant hardship on the
3 inmate," and, therefore, implicates a liberty interest under the Fourteenth
4 Amendment. *Sandin*, 515 U.S. at 494. The basis of Mr. Longshore's claim is that
5 he has been "subjected to a prolonged practice of formulaic periodic custody
6 reviews in violation of the Fourteenth Amendment." ECF No. 213 at 7-8. In other
7 words, Mr. Longshore believes his IMU status reviews have not been meaningful.
8 ECF No. 203 at 5. In support of this contention, Mr. Longshore points to a letter
9 sent by Defendant Herzog on September 30, 2015 ("Herzog Letter"). ECF No.
10 203, Exhibit A. According to Mr. Longshore, this letter constitutes "an admission
11 of a programmatic intent to keep Mr. Longshore confined in administrative
12 segregation." ECF No. 213 at 3.

13 Defendants respond by claiming that Mr. Longshore has received at least
14 four status reviews, ECF No. 115 at 4, all of which have been meaningful despite
15 resulting in his continued placement at the IMU. Moreover, Defendants' assert
16 that the Herzog Letter demonstrates Mr. Longshore's continued placement at the
17 IMU is the result of multiple factors, including: Mr. Longshore's July 2015
18 infractions; the fragile offender population in the BAR Units; and Mr.
19 Longshore's limited placement options due to threats to his life. ECF No. 203,
20 Exhibit A.

21 Although there is an issue of fact as to whether Mr. Longshore received
22 "meaningful" periodic reviews, the Court finds that this issue of fact is not
23 material. To survive Defendants' motion for summary judgment, Plaintiff must
24 show that the constitutional violation alleged was clearly established at the time of
25 the violation. *Pearson*, 555 U.S. at 232. The adequacy of a segregated status
26 review, *i.e.*, what constitutes a "meaningful" review, has not been clearly
27 established. Therefore, the Court need not determine whether a constitutional
28 violation occurred because the basis of Mr. Longshore's claim has not been clearly

1 established. The Court finds Defendants are entitled to qualified immunity from
2 Mr. Longshore's Fourteenth Amendment claim.

3 **CONCLUSION**

4 For the reasons set forth above, the Court finds Defendants are entitled to
5 qualified immunity as to Plaintiff's Eighth and Fourteenth Amendment claims.

6 After this motion for summary judgment was filed, Plaintiff attempted to
7 schedule the deposition of several witnesses but Defendants objected on the
8 grounds that the Court had previously stayed discovery pending resolution of the
9 qualified immunity issue. ECF No. 182. Plaintiff then filed a Motion for
10 Sanctions, ECF No. 180, which is now moot.

11 Accordingly, **IT IS HEREBY ORDERED:**

- 12 1. Defendants' Motion for Summary Judgment, ECF No. 111, is **GRANTED**
13 **in part and DENIED in part.** Defendants are immune from Plaintiff's
14 Eighth and Fourteenth Amendment Claims.
- 15 2. Plaintiff's claims under 42 U.S.C. § 1983 and the Eighth and Fourteenth
16 Amendments are **DISMISSED WITH PREJUDICE.**
- 17 3. Plaintiff's Motion for Sanctions, ECF No. 180, is **DENIED** as moot.

18 **IT IS SO ORDERED.** The Clerk of Court is directed to enter this Order
19 and forward copies to counsel.

20 **DATED** this 27th day of September 2017.



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25

A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

26 Stanley A. Bastian
27 United States District Judge
28